

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

FILED Page 2

JAN 29 2008

United States District Court		OF	THE WESTERN DISTRICT OF OKLAHOMA	
Name (under which you were convicted): HERSHELL EUGENE JONES, JR.			Docket or Case No.: CIV-2006-1157-L	
Place of Confinement: LAWTON CORRECTIONAL FACILITY, 8607 S.E. FLOWER MOUND RD., LAWTON, OK. 75041			Prisoner No.: 12,764	
Petitioner (include the name under which you were convicted) HERSHELL EUGENE JONES, JR.			Respondent (authorized person having custody of petitioner) JUSTIN JONES, DIRECTOR OKLAHOMA DEPT. OF CORRECTIONS	
The Attorney General of the State of OKLAHOMA				

PETITION

- (a) Name and location of court that entered the judgment of conviction you are challenging: DISTRICT COURT OF OKLAHOMA COUNTY, LOCATED IN OKLAHOMA COUNTY, STATE OF OKLAHOMA, WITHIN THE WESTERN DISTRICT OF OKLAHOMA.
(b) Criminal docket or case number (if you know): CF-00-3604 / CF-00-3941
- (a) Date of the judgment of conviction (if you know): NOVEMBER 19, 2001
(b) Date of sentencing: DECEMBER 20, 2001
- Length of sentence: a.) LIFE WITHOUT PAROLE ; b.) 45 YEARS ; c.) TWO 20 YEAR Sentences C.C.
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case: "MURDER 1st DEGREE : ROBBERY W/DANGEROUS WEAPON : ASSAULT & BATTERY W/DANGEROUS WEAPON : 2nd DEGREE BURGLARY"
- (a) What was your plea? (Check one)

(1) Not guilty <input type="checkbox"/>	(3) Nolo contendere (no contest) <input type="checkbox"/>
(2) Guilty <input checked="" type="checkbox"/>	(4) Insanity plea <input type="checkbox"/>

 (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? PLEA OF GUILTY TO ALL CHARGES.

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☐ Judge only ☒

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: OKLAHOMA COURT OF CRIMINAL APPEALS

(b) Docket or case number (if you know): C-2002-10

(c) Result: DENIED (See Ex. A)

(d) Date of result (if you know): JUNE 7, 2002

(e) Citation to the case (if you know): N/A

(f) Grounds raised: PETITIONER'S PLEA OF GUILTY WAS NOT KNOWINGLY AND VOLUNTARILY ENTERED.

(g) Did you seek further review by a higher state court? Yes ☐ No ☒

If yes, answer the following:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Result: N/A

N/A

(4) Date of result (if you know): N/A

(5) Citation to the case (if you know): N/A

(6) Grounds raised: N/A

N/A

N/A

N/A

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒ N/A

If yes, answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A

N/A

(3) Date of result (if you know): N/A

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: OKLAHOMA COUNTY DISTRICT COURT

(2) Docket or case number (if you know): CF-00-3604 / CF-00-3941

(3) Date of filing (if you know): JANUARY 12, 2006

(4) Nature of the proceeding: 22 O.S. § 1080 APPLICATION FOR POST-CONVICTION RELIEF

(5) Grounds raised: PROP. ONE: Petitioner's Pleas of guilty were not knowingly and voluntarily entered; PROP. II: Petitioner received ineffective assistance of trial counsel; PROP. III: The trial court erred in failing to hold a hearing to determine Petitioner's competency to stand trial before accepting his plea of guilty; and; PROP. IV: Petitioner received ineffective assistance of appellate counsel.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☒

(7) Result: APPLICATION DENIED.

(8) Date of result (if you know): MARCH 6, 2006. (See Exh. B)

- (b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: OKLAHOMA COURT OF CRIMINAL APPEALS

(2) Docket or case number (if you know): PC-2006-347

(3) Date of filing (if you know): MAY 15, 2006

(4) Nature of the proceeding: POST-CONVICTION APPEAL FROM DISTRICT COURT'S DENIAL.

(5) Grounds raised: PROP. I: SAME AS PRIOR APPLICATION: PROP. II: SAME AS PRIOR APPLICATION : PROP. III; SAME AS PRIOR APPLICATION : AND PROP. IV; SAME AS PRIOR APPLICATION.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☒

(7) Result: APPEAL DENIED.

(See Exh. C)

(8) Date of result (if you know): MAY 15, 2006.

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☐

N/A

(7) Result: N/A

(8) Date of result (if you know): N/A

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☐ No ☐ N/A

(3) Third petition: Yes ☐ No ☐ N/A

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

HABEAS CORPUS RELIEF BROUGHT BY PRISONER, PROCEEDING PRO SE, IN CIV-06-1157-C
WAS DISMISSED WITHOUT PREJUDICE ON PETITIONER'S MOTION TO WITHDRAW WITHOUT
PREJUDICE TO EXHAUST STATE COURT REMEDY, GRANTED ON NOVEMBER 29, 2007, DISMISSING
WITHOUT PREJUDICE WHERE ABATING WOULD BE INAPPROPRIATE WHERE FILING FEE WAS 'NT
PAID AND PETITION HAD 'NT BEEN GRANTED FORMA PUPERIS TO PROCEED YET.

(See Exh. D)

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: PETITIONER RECEIVED IFC OF APPELLATE COUNSEL IN CERTIORARI APPEAL OF JONES vs STATE, C-2002-10 ; WHERE APPELLATE COUNSEL FAILED TO ADDRESS TRIAL COUNSELS INEFFECTIVENESS.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

APPELLATE COUNSEL NEGLECTED TO RAISE TRIAL COUNSEL INEFFECTIVENESS AT GUILTY STAGE PROCEEDING

(b) If you did not exhaust your state remedies on Ground One, explain why: N/A

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 22 O.S. §§ 1080;1086 POST- CONV. APP " COLLATERAL REVIEW"

Name and location of the court where the motion or petition was filed: STATE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

Docket or case number (if you know): CF-00-3604 / CF-00-3941

Date of the court's decision: SEPTEMBER 7, 2007

Result (attach a copy of the court's opinion or order, if available): DISTRICT COURT'S DENIAL ORDER

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: OKLAHOMA COURT OF CRIMINAL APPEALS

Docket or case number (if you know): PC - 2007-984

Date of the court's decision: OCTOBER 29, 2007

(See Exh. E)

Result (attach a copy of the court's opinion or order, if available):

OCCA'S ORDER ATTACHED AS (EXH. B)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: PETITIONER SOUGHT WRIT OF HABEAS CORPUS IN CIV-06-1157-L FILED ON OCTOBER 19, 2006, WITHDRAWN IN ABEYANCE TO EXHAUST STATE COURT CLAIM ON NOVEMBER 29, 2006, WHERE THE U.S. WESTERN DIST. CT. DISMISSED WITHOUT PREJUDICE.

GROUND TWO: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

N/A

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

N/A

(2) If you did not raise this issue in your direct appeal, explain why: _____

N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

N/A

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

N/A

Name and location of the court where the motion or petition was filed: _____

N/A

Docket or case number (if you know): _____

N/A

Date of the court's decision: _____

N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

N/A

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

N/A

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

N/A

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

N/A

GROUND THREE: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

N/A

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

N/A

(2) If you did not raise this issue in your direct appeal, explain why: _____

N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

N/A

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: **N/A**

Name and location of the court where the motion or petition was filed: **N/A**

N/A

Docket or case number (if you know): **N/A**

Date of the court's decision: **N/A**

Result (attach a copy of the court's opinion or order, if available): **N/A**

N/A

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

N/A

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

N/A

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

N/A

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: **N/A**

N/A

Docket or case number (if you know): **N/A**

Date of the court's decision: **N/A**

Result (attach a copy of the court's opinion or order, if available): **N/A**

N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: **N/A**

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: **N/A**

N/A

GROUND FOUR: _____ **N/A** _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

N/A

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

N/A

(2) If you did not raise this issue in your direct appeal, explain why: _____

N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

N/A

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____ **N/A** _____

Name and location of the court where the motion or petition was filed: _____

N/A

Docket or case number (if you know): _____ **N/A** _____

Date of the court's decision: _____ **N/A** _____

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

N/A

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

N/A

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

N/A

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

N/A

Docket or case number (if you know): _____

N/A

Date of the court's decision: _____

N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ~~XX~~ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: **NO**

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ~~XX~~

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

N/A

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

N/A

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: ATTY. CATHERINE HMMARSEN, (OBA # 15251)

(b) At arraignment and plea: SAME

(c) At trial: N/A

(d) At sentencing: SAME

(e) On appeal: APPELLATE DIVISION OF PUBLIC DEFENDERS OFFICE/ LEAD ATTY. CAROLYN MERRITT and GINA K. WALKER, asst. TO LEAD ATTY. (OBA # 15132)

(f) In any post-conviction proceeding: PRO SE LITIGANT (PETITIONER) assisted by OKLAHOMA STATE PENITENTIARY LAW CLERK.

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

N/A

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.* _____

Petitioner's petition is not time barred and is subject to "EQUITABLE TOLLING" under AEDPA Statutes of Limitations. 28 U.S.C.A. §§ 2244(d), 2254(d)(1)(2) AEDPA, U.S.C.A. Const. Amends. 14,5. Petitioner should be granted equitable tolling for circumstances beyond his control for the following reasons to witt:

"ON NOVEMBER 19, 2001, PETITIONER ENTERED HIS PLEA OF GUILTY IN CF-00-3601/CF-00-3941, WHERE HIS PLEA WAS NOT KNOWINGLY OR INTELLIGENTLY MADE DUE TO THE TRIAL COURT FAILED TO DETERMINE PETITIONER'S MENTAL COMPETENCY PRIOR TO ACCEPTING HIS PLEA OF GUILTY."

"NOVEMBER 28, 2001, PETITIONER, PRO SE, FILED AN APPLICATION TO WITHDRAW HIS PREVIOUSLY ENTERED PLEAS OF GUILTY."

"DECEMBER 20, 2001, AFTER CONDUCTING HEARING ON PLEA WITHDRAW AND DENYING SAID APPLICATION, JUDGE PASS PROCEEDED TO SENTENCE PETITIONER IN ACCORDANCE WITH TERMS OF AGREEMENT."

"ON JUNE 7, 2002, PETITIONER SOUGHT CERTIORARI APPEAL TO THE OKLAHOMA COURT OF CRIMINAL APPEALS IN CASE NO. C-02-10, DENIED ON JUNE 7, 2002. (SEE PG. 5a at infra. #18)."

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(Infra. # 18)

"APPLICATION FOR STATE 22 O.S. § 1080 FOR POST-CONVICTION RELIEF FILED ON JANUARY 19, 2006, DENIED ON MARCH 6, 2006, CONFIRMED BY THE OCCA ON MAY 15, 2006 IN CASE NO. PC-06-347."

"PETITIONER SOUGHT 28 U.S.C. § 2254 PETITION FOR WRIT OF HABEAS CORPUS IN THE U.S. WESTERN DISTRICT COURT IN CASE NO. CIV-06-1157-L, FILED ON OCTOBER 19, 2006, WITHDRAWN IN ABEYANCE TO EXHAUST STATE COURT CLAIMS IN PETITIONER'S MOTION DISMISSED WITHOUT PREJUDICE ON NOVEMBER 29, 2006."

Petitioner presents upon the exhaustion of his State claims petitioner resubmits his Petition for Writ of Habeas Corpus newly exhausted claims previously dismissed without prejudice to refile.

Petitioner presents that there is a continuous state of incompetence at all times where his petition is having to be prepared through legal assistance of all his prior litigations and present filings, and is documented by some evidence through his MENTAL PSYCHIATRIC EVALUATION RECORDS. (See Attached Documents Pgs. 1-9,) Id. As Exh. F)

The continuing state of incompetency as so construed by the United States Tenth Circuit Court of Appeals in SENA vs NEW MEXICO STATE PRISON, 109 F.3d 652 (10th Cir. 1997) held..."the prior adjudication of incompetence in this case gives rise to rebuttable presumption of continued incompetence. (SEE ATTACHED MENTAL EVALUATION DOCUMENTS) See KITCHENS vs U.S., 272 F.2d 757, 981 (10th Cir. 1959); HURT vs U.S., 327 F.2d 978, 981 (8th Cir. 1964). This presumption applies in Habeas Corpus Proceedings, HULL vs FREEMAN, 932 F.2d 159, 168 (3rd Cir. 1991), but may be overcome by competent evidence. See U.S. vs CLARK, 617 F.2d 180, 184 (9th Cir. 1980).

Therefore, petitioner asks that the Court grant the following relief: TO REVERSE AND REMAND BACK TO STATE COURT WITH INSTRUCTIONS WHERE DUE PROCESS HAS NOT BEEN PROVIDED IN DENYING RIGHT TO MENTAL COMPETENCY DETERMINATION BY THE COURT'S MENTAL HEALTH PROVIDER, OR GRANT IMMEDIATE RELEASE.

or any other relief to which petitioner may be entitled.

Herschell Jones

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on

January 28, 2008 (month, date, year).

Executed (signed) on 1-28-08 (date).

Herschell Jones

Signature of Petitioner